No. 82-2136

In the Supreme Court of the United States

OCTOBER TERM, 1983

FREZZO BROTHERS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioners contend that their trial counsel was incompetent because he failed to assert a defense that would have been unavailing.

1. Petitioners were convicted of willfully and negligently discharging pollutants into navigable waters of the United States without obtaining a permit, in violation of 33 U.S.C. (& Supp. V) 1311(a) and 1319(c).[1] The pollution resulted from petitioners' manufacturing of mushroom compost, a process that involves circulating water through a mixture of hay and horse manure. A concrete holding tank caught the water that ran off from the mixture and recycled it through the mixture. Nearby was an entirely separate storm water

[1]Petitioners Guido Frezzo and James L. Frezzo were each sentenced to 30 days' imprisonment and a fine of $25,000; petitioner Frezzo Brothers, Inc., was fined $50,000. Pet. App. A54.

runoff system that ultimately drained into navigable waters. As a result of both willful acts and negligence by petitioners, the holding tank overflowed on several different occasions and discharged pollutants into the storm water system and ultimately into the stream leading to navigable waters. See Pet. App. A19-A21, A28, A68-A70.

Petitioners' convictions were affirmed (Pet. App. A16-A30) and this Court denied certiorari (444 U.S. 1074 (1980)). Petitioners then moved to vacate their sentences under 28 U.S.C. (Supp. V) 2255. They claimed that their actions were not unlawful because a regulation, 40 C.F.R. 125.4(i) (1978), exempted them from the permit requirement. That regulation provided that water pollution "from agricultural * * * activities" does not require a permit, except if it is a "[d]ischarge[] from [an] agricultural point source[] * * *." See Pet. App. A60. Petitioners had not raised this claim at or before trial, and they did not raise it on direct appeal until they filed a rehearing petition in the court of appeals. In their Section 2255 motion, they also asserted that their trial counsel (who handled the appeal but not the rehearing petition) was incompetent for not having asserted this defense sooner.

The United States District Court for the Eastern District of Pennsylvania denied relief (Pet. App. A31-A37), but the court of appeals reversed and remanded for a hearing on the question whether petitioners' pollution was "agricultural" within the meaning of the regulation (*id.* at A47-A48).On remand, the district court again denied relief. *Id.* at A50-A76.

The district court first noted that, as evidenced by their failure to raise the claim at trial or on appeal, petitioners had not relied on the agricultural exemption when they discharged the pollutants and therefore could not claim that they were unfairly surprised. See Pet. App. A63-A65("[B]y

their own admission, the regulations were unknown to the petitioners until nearly one year after their trial and were never relied upon by the [petitioners] when they made their decision to pollute the creek * * * * *. On the contrary, regulatory agencies during the 1970s suggested to [petitioners] that the government considered their conduct to be unlawful.").

The district court then ruled that it was "abundantly clear that the Frezzo Brothers mushroom composting operation is clearly not an 'agricultural activity' within the meaning of 40 C.F.R. § 125.4(i)." Pet. App. A67. "Common understandings of the terms involved, when applied to this case, lead inexorably to the conclusion that the composting which takes place at Frezzo Brothers is not an agricultural activity for purposes of the regulations and the Water Pollution Control Act." *Id.* at A73. The court explained that this process involved combining and treating raw materials, and it drew an analogy to *Donovan* v. *Frezzo Bros., Inc.*, 678 F.2d 1166 (1982), in which the Third Circuit ruled that the same operation was not "agriculture" within the meaning of the Fair Labor Standards Act. Pet. App. A70-A73.

The district court also ruled that even if petitioners were engaged in "agricultural activities" within the meaning of the regulation, they would still not have been exempt from the permit requirement because the pollution emanated from an "agricultural point source." Pet. App. A74. The court then stated (*id.* at A75): "In light of this Court's determination that the 'agricultural activity' exclusion does not apply to petitioners, it cannot be said that they were ineffectively represented at trial by their former counsel * * *." The court of appeals summarily affirmed. *Id.* at A78-A79.

2. Petitioners' claim appears to be that competent counsel would have contended at trial that their activity was within the "agricultural activity" exemption; that this contention would have been submitted to the jury; and that the

jury might then have acquitted them. See Pet. 12. But petitioners do not take issue with the district court's determination that, correctly construed, the agricultural exemption does *not* apply to their activity. Thus, their claim amounts to a contention that their trial counsel must be held incompetent, and a new trial ordered, because counsel failed to raise a meritless claim.

This contention is plainly incorrect for several reasons. First, the facts about the nature of petitioners' composting operation were undisputed; the district court's ruling that petitioners' operation was not within the "agricultural activity" exemption was a conclusion of law based on those undisputed facts. Thus, even if trial counsel had requested a jury instruction relating to the agricultural activity defense, the district court could have refused to give such an instruction. See *United States* v. *Bailey*, 444 U.S. 394, 415-416 (1980).

Moreover, as we have explained at pages 12-18 of the Brief for the United States as Amicus Curiae in *Strickland* v. *Washington*, cert. granted, No. 82-1554 (June 6, 1983),[2] a showing of prejudice is an essential element of a claim of ineffective assistance of counsel. Since petitioners were not entitled to prevail on the claim that their activity was within the agricultural exemption, the only prejudice they can possibly allege is that somehow, through error or unauthorized jury lenity, the raising of this meritless claim at trial might have led to their acquittal. This Court has made it entirely clear that such speculation does not entitle a defendant to a new trial even when defense counsel's supposed failure was the government's fault. See *United States* v. *Agurs*, 427 U.S. 97, 108-109 (1976), citing *Brady* v. *Maryland*, 373 U.S. 83, 90-91 (1963). A fortiori, such

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[2]We have sent a copy of this brief to petitioners.

speculation does not entitle petitioners to relief, when the failure to raise the defense was the result of their own counsel's choice or omission.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1983

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[3]Petitioners assert that the government argued at trial that their pollution was "agricultural" in nature and therefore cannot now contend otherwise. See Pet 9-11. But as the district court noted (Pet. App. A76), the "agricultural" nature of petitioners' activity was not in issue at the trial. In any event, since the "agricultural activity" exemption of 40 C.F.R. 125.4 (1978) was not raised at trial, any references to the agricultural nature of petitioners' activity are not material to the question presented by the petition.

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